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Patent and Trademark Office: U.S. DEPARTMENT OF COMMERCE

PETITION ROUTING SLIP

(Find the petition from the list and check the box in the heading above the petition)

Complete if Known	
Application Number	08/557.586
Filing Date	11/14/95
First Named Inventor	Mark Saubib
Group Art Unit	2307
Examiner Name	Jean R. Homere
Attorney Docket Number	10951196-1

☒ PETITIONS DECIDED BY PETITIONS OFFICE

- 301 Relating to Public Use Proceedings (37 CFR 1.292)
302 To make application special - prospective manufacture (37 CFR 1.102, MPEP 708.02)
303 To make special - infringement (37 CFR 1.102, MPEP 108.02)
304 Relating to the Filing/Issuance of Divisional Reissue (37 CFR 1.177)
305 To waive or suspend rules (37 CFR 1.183)
306 To exchange a paper from patent application or patent fee (37 CFR 1.59)
307 Withdrawal of Attorney (37 CFR 1.36)
308 For access to application except re proceedings before Board (37 CFR 1.14, MPEP 103.104)
309 Relating to Small Entity (37 CFR 1.28)
310 Relating to reexamination (37 CFR 1.181-1.183)
311 For correction of inventorship for applications - no filing date (37 CFR 1.48)
312 For correction of inventorship re PCT applications (37 CFR 1.48)
313 For filing application without one or more inventors (37 CFR 1.47)
314 For filing PCT application without one or more inventors (37 CFR 1.47)
315 For extension of time without fee in cases in Application Division (37 CFR 1.136(b))
399 For matters before A/C for Patents - not specified
408 Relating to a filing date under 35 USC 111 & 37 CFR 1.53
411 Filing date for application filed by Express Mail (37 CFR 1.10)
412 Filing date for lost application
501 To revive an abandoned application - unavoidable delay (37 CFR 1.137(b))
502 To revive an abandoned application - unintentional abandonment (37 CFR 1.137(b))

- 503 To waive/suspend rules (37 CFR 1.183)
504 To invoke supervisory authority - re patent examining operations (37 CFR 1.181)
505 To withdraw from issue after payment of issue fee (37 CFR 1.313(b)(1)-(4))
506 To withdraw from issue after payment of issue fee (37 CFR 1.313(b)) or abandon application in favor of continuing application
507 To enter priority papers after issue Fee payment (37 CFR 1.55(a))
508 To defer issuance of patent (37 CFR 1.314)
510 To invoke supervisory authority - re Office of Admin. (37 CFR 1.181)
511 To waive/suspend rules re patent matters in Office of Admin. (37 CFR 1.183)
516 To decide matters before Deputy A/C for Patents under 37 CFR 1.182
519 To refuse refusal to accept & record maintenance fee - application filed on or after 8/27/82 (37 CFR 1.377)
523 To issue patent in the name of the Assignee (37 CFR 1.334(c))
525 To withdraw a holding of abandonment (37 CFR 1.181)
526 To order a Commissioner-initiated Reexamination proceeding (37 CFR 1.520)
527 To convert Provisional Application
528 To reinstate abandoned Provisional Application
529 To petition-unavoidable
531 PCT petition-unintentional
532 To accept unavoidably delayed payment of maintenance fee (37 CFR 1.378 (b))
533 To accept unintentionally delayed payment of maintenance fee (37 CFR 1.378 (c))
534 Petitions related to reexamination proceedings
589 For matters before the Deputy A/C for Patents - not specified

☐ PETITIONS DECIDED BY THE GROUP DIRECTOR

- 601 To make application special on ground of age or health (37 CFR 1.102, MPEP 708.02)
602 To make special - continuity of earlier application (37 CFR 1.102, MPEP 708.02)
603 To make special - environment quality program (37 CFR 1.102, MPEP 708.02)
604 To make special - environmental protection (37 CFR 1.102, MPEP 708.02)
605 To make special - Energy Program (37 CFR 1.102, MPEP 708.02)
606 To make special - Recombinant DNA (37 CFR 1.102, MPEP 708.02)
607 To make special for reasons not provided for in codes 601-606 (37 CFR 1.102, MPEP 708.02)
608 To reopen prosecution after Board decision (37 CFR 1.196)
609 For review of final restriction requirement (37 CFR 1.144)
610 Invoking Authority of Commissioner under 37 CFR 1.181 not specified in codes
611 Relating to the prematureness of final rejection (37 CFR 1.181, MPEP 706.07(c))
612 Relating to the refusal to enter an amendment (37 CFR 1.181 & 1.127, MPEP 714.19)
613 To withdraw a holding of abandonment (37 CFR 1.137, MPEP 711.03)
614 Relating to a requirement to cancel new matter from application (37 CFR 1.181, MPEP 608.04(c))
615 Relating to formal sufficiency/propriety of affidavits (37 CFR 1.131, 1.132, 1.606, MPEP 715.07)
616 To institute an interference (37 CFR 1.166)
617 Relating to refusal to enter an amendment under 37 CFR 1.312

- 618 For concurrent Ex parte and Inter parte proceedings (37 CFR 1.212)
619 For return of original oath of patent application (MPEP 604.04(c))
620 For extension of time (37 CFR 1.136(b))
621 For interview after Notice of Allowance mailed (MPEP 713.10)
622 To institute appeal application before transfer of jurisdiction to Board (MPEP 1206)
623 For second or subsequent suspension of action (37 CFR 1.103, MPEP 709)
625 To reinstate Appeals dismissed in Group
626 From denial of reexamination request (37 CFR 1.515(c))
627 To enter an amendment after payment of issue fee (37 CFR 1.312(b))
628 From refusal to issue a Certificate of Correction (37 CFR 1.181, MPEP 1480-1485)
629 For withdrawal of application pending in group (37 CFR 1.36)
630 For extension of time in a reexamination (37 CFR 1.550(c))
631 To merge multiple reexamination proceedings (37 CFR 1.565(c), MPEP 2283)
632 To effect a second conversion of invention (37 CFR 1.48, MPEP 201.03)
633 Supernumerativity
634 To correct inventorship in a patent not in interference (37 CFR 1.324, MPEP 1481)
635 To change inventorship in an application (37 CFR 1.148)
636 To change inventorship in a patent (37 CFR 1.148)
637 To withdraw from issue before payment of an issue fee (37 CFR 1.313(c))
699 For matters before Group Director - not specified

☐ PETITIONS DECIDED BY BOARD OF PATENT APPEALS AND INTERFERENCES

- 701 To exercise supervisory authority re action by examiner/examiner-in-chief (37 CFR 1.644)
702 To accept belatedly filed copies of interference settlement agreements (35 USC 135(c), 37 CFR 1.666(c))
703 For withdrawal of attorney in proceeding under 37 CFR 1.201 - 1.288 (37 CFR 1.36)
704 For access to a settlement agreement under 35 USC 135(c) (37 CFR 1.666(b))
705 For access to an application in proceedings before the Board (37 CFR 1.14(e))
706 From a refusal to issue a Certificate of Correction (37 CFR 1.132, 1.323)
707 To correct errors in inventorship (37 CFR 1.324)
708 For extension of time to file amendment under 37 CFR 1.196(b) (37 CFR 1.136)
709 To make an application before the Board special (37 CFR 1.102)
710 For extension of time to file supplemental Reply Brief (37 CFR 1.136)

- 711 To assign particular members to hearing or to request augmented panel (35 USC 7)
712 To decide miscellaneous questions in proceedings under 37 CFR 1.601-1.688
713 To accept priority papers in applications in interference (37 CFR 1.644)
714 To reinstate an Appeal
799 For matters before Chairman of Board - not specified
801 To make an application before the Board special (37 CFR 1.102)
802 To reinstate an Appeal
803 To extend time to respond to proceedings (37 CFR 1.196, 1.197, 1.304)
804 For extension of time to file supplemental Reply Brief (37 CFR 1.136)
805 To accept late request for an Oral Hearing (37 CFR 1.136)
899 For matters before the Clerk of the Board - not specified

☐ PETITIONS DECIDED BY SPECIAL LAWS (SECURITY AND GOVERNMENT INTEREST MATTERS)

- 901 Under 42 USC 2182
902 Under 42 USC 2427
903 Under 35 USC 184

- 904 Under 35 USC 267
905 To consider/review security or Government interest matters - not specified

☐ PETITIONS DECIDED BY THE SOLICITOR

- 951 Petitions for extension of time in court matters 35 USC 142, 145, 148
952 Petitions relating to ex parte decisions in cases before the Court of Appeals for the Federal Circuit
953 Requests filed under the Freedom of Information Act
959 Not specified

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UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
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Washington, D.C. 20231

Paper No. 11

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OFFICE OF
PATENT PUBLICATION

In re Patent No. 5,745,906
Issue Date: April 28, 1998
Application No. 08/557,586
Filed: Nov. 14, 1995
Attorney Docket No. 10951196-1

DECISION ON PETITION

This is a decision on the petition under 37 CFR 1.313 (b) (5), received via facsimile April 23, 1998, to withdraw the above-identified case from issue.

The petition is dismissed.

The petition was not received within sufficient time to prevent issuance of the instant patent. A petition under 37 CFR 1.313 (b) (5) must be received and granted by an appropriate official in the Office of Patent Publication within sufficient time to avert issuance of an application into a patent.

Petitioner may request by way of a petition under 37 CFR 1.182 that the Continuation Prosecution Application (CPA) be converted to an application under 37 CFR 1.53 (b) in order to have the prior art considered by the examiner. The fee for a petition under 37 CFR 1.182 to convert will be waived in this instance. The petition to convert should be directed to the Special Program Law Office and must include the filing of a complete application, i.e., specification, claims and drawings, if required. Information regarding the filing of a petition to convert may be obtained by calling the Special Program Law Office on (703) 305-9282.

This file is being forward to Files Repository.

Telephone inquiries concerning this matter may be directed to the undersigned at (703)

308-5254.

Karla Cooper
Karla Cooper
Paralegal Specialist
Office of the Director
Office of Patent Publication

408 553 3888 P. 04/24

IPR LEGAL

EXHIBIT

A



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Mark Squibb

Serial No.: 08/557,586

Filing Date: 11/14/95

Title: METHOD AND APPARATUS FOR
MERGING DELTA STREAMS TO
RECONSTRUCT A COMPUTER
FILE

Group Art Unit: 2307

Examiner: Jean R. Homere

**PETITION TO INVOKE THE SUPERVISORY AUTHORITY
OF THE COMMISSIONER UNDER**

37 CFR 1.181(a)(3)

AND

SECTION 1002.02(b)(3) OF THE MPEP

To The Honorable Assistant Commissioner for Patents
Washington, D.C. 20231

ATTN: OFFICE OF PETITIONS
Petitions Information
Crystal Park One, Suite 520

07/14/1998 SSRLEEKU 00000081 111150 08557586

01 FC:122 Dear Sir: CH

Applicant hereby petitions from the dismissal of his Petition For Withdrawal
From Issue Under 37 CFR 1.313(b)(5).

Background

The above-identified application issued as US Patent No. 5,745,906 on April
28, 1998.

On April 23, 1998, five days prior to the scheduled issue date of the above-

identified application, applicant's representative filed a Petition For Withdrawal From Issue Under 37 CFR 1.313(b)(5) (hereinafter referred to as the "Petition").

Applicant's Petition was filed with the Office of Patent Publication by facsimile transmission.

Decision Below

On May 5, 1998, applicant's Petition was dismissed by the Office of Patent Publication for the following the reason:

The petition was not received within sufficient time to prevent issuance of the instant patent. A petition under 37 CFR 1.313(b)(5) must be received and granted by an appropriate official in the Office of Patent Publication within sufficient time to avert issuance of an application into a patent.

Reference is made to Exhibit A.

Discussion of the Applicable Law

Individuals associated with the filing or prosecution of a patent application have a duty to disclose to the patent office "information material to patentability".

This duty is set forth in 37 CFR 1.56(a) as follows:

(a) A patent by its very nature is affected with a public interest. The public interest is best served, and the most effective patent examination occurs when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability. Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section. The duty to disclose information exists with respect to each pending claim until the claim is cancelled or withdrawn from consideration, or the application becomes

abandoned. Information material to the patentability of a claim that is cancelled or withdrawn from consideration need not be submitted if the information is not material to the patentability of any claim remaining under consideration in the application. There is no duty to submit information which is not material to the patentability of any existing claim. The duty to disclose all information known to be material to patentability is deemed to be satisfied if all information known to be material to patentability of any claim issued in a patent was cited by the Office or submitted to the Office in the manner prescribed by §§ 1.97(b)-(d) and 1.98. However, no patent will be granted on an application in connection with which fraud on the Office was practiced or attempted or the duty of disclosure was violated through bad faith or intentional misconduct. The Office encourages applicants to carefully examine:

- (1) Prior art cited in search reports of a foreign patent office in a counterpart application, and
- (2) The closest information over which individuals associated with the filing or prosecution of a patent application believe any pending claim patentably defines, to make sure that any material information contained therein is disclosed to the Office.

Information which is material to patentability is defined in 37 CFR 1.56(b):

(b) Under this section, information is material to patentability when it is not cumulative to information already of record or being made of record in the application, and

(1) It establishes, by itself or in combination with other information, a *prima facie* case of unpatentability of a claim; or

(2) It refutes, or is inconsistent with, a position the applicant takes in:

(i) Opposing an argument of unpatentability relied on by the Office, or

(ii) Asserting an argument of patentability.

A *prima facie* case of unpatentability is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard, giving each term in the claim its broadest reasonable construction consistent with the specification, and before any consideration is given to evidence which may be submitted in an attempt to establish a contrary conclusion of patentability.

With respect to who determines what information is material to patentability, MPEP 2001.04 states that, "It is the patent examiner who should make the determination after considering all the facts involved in the particular case." MPEP

2001.04, Rev. 2, July 1996, p. 2000-3. In order that one may comply with his or her duty of disclosure under 37 CFR 1.56, MPEP 2001.04 therefore suggests that 37 CFR 1.56 be viewed as setting forth "a duty of candor and good faith which is *broader* than the duty to disclose material information." Id. at p. 2000-2.

MPEP 2001.05 states that:

... The Office believes that most applicants will wish to submit ... information, however, even though they may not be required to do so, to strengthen the patent and avoid the risks of an incorrect judgment on their part on materiality or that it may be held that there was an intent to deceive the Office.

As set forth above, 37 CFR 1.56 states that:

... The duty to disclose all information known to be material to patentability is deemed to be satisfied if all information known to be material to patentability of any claim issued in a patent was cited by the Office or submitted to the Office in the manner prescribed by §§ 1.97(b)-(d) and 1.98.

37 CFR 1.97 and 1.98 set forth a procedure for filing an Information Disclosure Statement (IDS) with the USPTO (hereinafter referred to as the "Office"). 37 CFR 1.97(h) states:

(h) The filing of an information disclosure statement shall not be construed to be an admission that the information cited in the statement is, or is considered to be, material to patentability as defined in § 1.56(b).

One who has a duty to disclose information under 37 CFR 1.56 may therefore disclose information to the patent examiner using the "safe harbor" procedure of 37 CFR 1.97 and 1.98, so that the patent examiner, and not the person owing the duty under 37 CFR 1.56, may make a determination as to whether the information is in fact material to patentability. The burden of determining information's materiality is thereby appropriately placed on the patent examiner, and the person owing the duty to disclose information under 37 CFR 1.56 is allowed to fulfill his or her duty while avoiding "the risks of an incorrect judgment".

Unfortunately, 37 CFR 1.97 only provides procedures for filing an IDS up until the earliest of:

- (1) A final action under § 1.113 or
- (2) A notice of allowance under § 1.311[.]

*Not so new
under rules*

However, MPEP 2001.04 states:

37 CFR 1.56(a) states that the duty to disclose information exists until the application becomes abandoned. The duty to disclose information, however, does not end when an application becomes allowed but extends until a patent is granted on that application.

MPEP 2001.04, Rev. 2, July 1996, p. 2000-3.

37 CFR 1.313 (entitled "Withdrawal From Issue") was therefore amended in 1992 to fill the gaps left by 37 CFR 1.97. As further stated in the MPEP:

... The rules provide for information being considered after a notice of allowance is mailed and before the issue fee is paid (37 CFR 1.97(d)) and for an application to be withdrawn from issue because one or more claims are unpatentable (37 CFR 313(b)(3)) or for an application to be withdrawn from issue and abandoned so that information may be considered in a continuing application before a patent issues (37 CFR 1.313(b)(5)).

MPEP 2001.04, Rev. 2, July 1996, p. 2000-3.

Specifically, 37 CFR 1.313(b)(5) provides that:

(b) When the issue fee has been paid, the application will not be withdrawn from issue for any reason except:

(5) For abandonment to permit consideration of an information disclosure statement under § 1.97 in a continuing application.

MPEP 1308 provides specific details concerning the implementation of 37 CFR 1.313(b)(5) by the Office:

If the applicant wishes to have the case withdrawn from issue, he or she must petition the Commissioner (MPEP 1002.02(b)(4)). Once the

old MPEP

issue fee is paid withdrawal is permitted only for the reasons stated in 37 CFR 1.313(b). The status of the application, at the time the petition is filed is determinative of whether the petition is considered under 37 CFR 1.313(a) or 37 CFR 1.313(b).

In addition to the specific reasons identified in 37 CFR 1.313(b)(1)-(4), applicant should be able to identify some specific and significant defect in the allowed application before the application will be withdrawn from issue. It is the policy of the Patent and Trademark Office to permit an application to be withdrawn from issue under 37 CFR 1.313(a) to file a continuing application, unless the application to be withdrawn is itself a continuing application. This policy does not affect applicant's right and ability to file a continuing application on or before the last day the issue fee is due and permit the parent application to become abandoned for failure to pay the issue fee (35 U.S.C. 151).

For withdrawal from issue pursuant to 37 CFR 1.313(b)(5), see the discussion in MPEP § 609 at B(4).

Note that the first paragraph, *supra*, states that the status of the application at the time a petition is filed under 37 CFR 1.313 is determinative of whether the petition falls under 1.313(a) or 1.313(b). Yet no mention is made of a petition's timing being determinative of the petition's grant. The grant of a petition under 37 CFR 1.313(b)(5) therefore appears to be guaranteed to an applicant (much the same way the grant of a Petition for Extension of Time is guaranteed to an applicant), so long as the applicant abides with the procedure for filing such a petition as set forth in 37 CFR 1.313(b)(5), MPEP § 1308, and MPEP § 609(B)(4).

Also note that a 37 CFR 1.313 petition only hinges on the applicant's recitation of a "specific and significant defect in the allowed application" when such a petition is filed under one of the clauses enumerated in 37 CFR 1.313 (b)(1)-(4). No specific and significant defect need be alleged if a petition is filed under 37 CFR 1.313(b)(5). This is because 37 CFR 1.313(b)(5) is intended to fill a gap in the IDS procedure set forth in 37 CFR 1.97, and as previously noted, 37 CFR 1.97 is intended to allow one having a duty under 37 CFR 1.56(a) to disclose information without making any sort of admission against interest.

As noted in the above excerpt taken from MPEP 1308, reference is made to MPEP 609(B)(4) for further details on filing a petition under 37 CFR 1.313(b)(5). MPEP 609(B)(4) states, in part, that:

After the issue fee has been paid on an application, it is impractical for the Office to attempt to consider newly submitted information. Information disclosure statements filed after payment of the issue fee in an application will not be considered but will merely be placed in the application file. . . . The application may be withdrawn from issue at this point, however, pursuant to 37 CFR 1.313(b)(5) so that the information can be considered in a continuing application. In this situation, a file wrapper continuing application under 37 CFR 1.62 could be filed even though the issue fee had already been paid. The Office will consider the filing of a petition under 37 CFR 1.313(b)(5) as sufficient grounds to waive the requirement that an application under 37 CFR 1.62 be filed before payment of the issue fee.

MPEP 2001.04, Rev. 2, July 1996, p. 2000-3.

Note that applicant filed a Request for a Continued Prosecution Application in the instant case, which is the intended replacement for the now defunct File Wrapper Continuation procedure under 37 CFR 1.62.

Grant of Petition for Withdrawal from Issue is Applicant's Only Relief

Nowhere in the applicable laws, regulations, and procedures pertaining to petitions under 37 CFR 1.313(b)(5) is it stated 1) that the grant of such petitions is intended to be discretionary, or 2) that such petitions will be dismissed if filed too close to a patent's issue date. Rather, the grant of such petitions appears to be guaranteed, much the same way that the grant of a Petition for Extension of Time is guaranteed. The MPEP makes it clear that those owing a duty under 37 CFR 1.56(a) owe such a duty up until the very day a patent issues. Subsequent to paying a patent's issue fee, the only way one owing a duty under 37 CFR 1.56(a) may comply with their duty is by filing a petition under 37 CFR 1.313(b)(5). There is no indication in the applicable laws, regulations, and procedures pertaining to petitions under 37 CFR 1.313(b)(5), or the duty of disclosure under 37 CFR 1.56(a), that the duty of disclosure under 37 CFR 1.56(a) ceases to be applicable some arbitrary number of days prior to a patent's issuance. Once an applicant, his or her

representative, or any other party owing a duty under 37 CFR 1.56(a) has complied with his or her duty by following the procedure set forth in 37 CFR 1.313(b)(5), it seems that the Office then has a duty to uphold its own procedures and grant applicant's Petition for Withdrawal from Issue.

Applicant further notes that a grant of his Petition to Withdraw from Issue is his only redress in this matter.

Office personnel have proposed many alternative avenues of redress, but none of these avenues are acceptable to applicant.

One solution proposed by Office personnel was to 1) convert applicant's Request for a Continued Prosecution Application into a Request for a 1.53(b) Continuation Application, and then 2) file an IDS disclosing additional information in the 1.53(b) continuation. This solution is not acceptable in that the continuation would be rejected on the basis of statutory double patenting. A statutory double patenting rejection could be avoided by 1) amending the claims of the continuation so that they differ in some obvious way over the patent which issued on the above-identified application, and then 2) filing a terminal disclaimer in the continuation case. However, even if applicant were to follow this procedure, it would have no bearing on the strength of the parent case due to the patent examiner's considering the additional information with respect to the parent case.

Office personnel have also suggested that applicant file a statutory disclaimer in his issued patent, to thereby avoid a statutory double patenting rejection in a continuation case. However, the filing of a statutory disclaimer in the parent case is unacceptable in that applicant would be required to make a statement that he has "reason to believe that without any deceptive intention, claims of the above identified patent are too broad or invalid". Applicant does not wish to make this statement, as he does not believe that his claims are too broad or invalid. Rather, he believes his claims to be perfectly valid and enforceable, but merely desires that a patent examiner consider additional information (which he believes to be immaterial) so that the patent examiner may properly determine whether applicant's own conclusion as to the materiality of the additional information is in fact the correct conclusion (since the patent examiner makes the ultimate determination as to

materiality as per MPEP § 2001.04).

Another solution to the dismissal of applicant's Petition which has been suggested by Office personnel is applicant's filing for a re-examination of his patent. Again, this solution is unacceptable in that applicant would be required to file a statement that a "substantial new question of patentability" existed. As previously stated, applicant does not believe that his additional information creates such a question.

Requested Relief

For the foregoing reasons, it is submitted that the Office of Patent Publication erred in dismissing applicant's Petition, and reversal of that decision is respectfully requested.

In light of the above facts and law, applicant requests that the Commissioner 1) grant his Petition to Withdraw from Issue, 2) convert his Request for a Continued Prosecution Application to a Request for a Continuation Under 37 CFR 1.53(b), and 3) subsequent to the grant of his Request for a Continuation, publish a notice in the Official Gazette that U.S. Patent No. 5,745,906 was issued in error and has no legal effect.

This Petition is deemed to be timely filed on July 6, 1998 since the decision dismissing applicant's Petition was made on May 5, 1998, and July 5, 1998, the two month deadline for filing this petition, fell on a Sunday.

Respectfully submitted,
KLAAS, LAW, O'MEARA & MALKIN, P.C.

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